

Internal Revenue Service

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Washington, DC 20224

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Legend:

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| Taxpayers | = |
| Year 1 | = |
| Accountant | = |
| Business Accountant | = |
| Date 1 | = |

Dear :

This ruling letter is in response to your letter ruling request dated October 7, 2019. In your letter ruling request, you requested an extension of time to make an election to treat net capital gains from the disposition of property held for investment as investment income under §§ 163(d)(1) and 163(d)(4) of the Internal Revenue Code for tax year . The request is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayer is a husband and wife who made a joint return under section 6013 for Year 1. Taxpayer hired Accountant to advise them on all of their business and individual tax matters. Taxpayer has been a client of Accountant for over years. Taxpayer has been satisfied with services Accountant provided.

For Year 1, Taxpayer filed for an extension and Accountant timely submitted the original return by the extended due date. Taxpayer had investment interest expense and net

capital gains from the disposition of property held for investment during Year 1. Accountant did not prepare the return for the Taxpayer so as to elect on Form 4952, Investment Interest Expense Deduction, inclusion of any part of Taxpayer's net capital gain in investment income on the original return for Year 1. In this vein, Accountant did not advise Taxpayer to make the election under §163(d)(4)(B) at that time.

A separate Accountant ("Business Accountant") performs accounting services for a business Taxpayer owns. During the course of their engagement, the Business Accountant was asked to review the Taxpayer's Year 1 individual income tax return. After discussing the matter generally, the Business Accountant agreed that filing an amended return to take advantage of the accumulated investment interest expenses would be appropriate.

Taxpayer returned to Accountant to inquire about amending the Year 1 individual income tax return to make an election to treat the proceeds of the sale of the building as investment income. Accountant advised making such an election would be appropriate. Accountant prepared, and the taxpayers submitted the amended return on Date 1, more than 6 months after the due date of the original return. Accountant did not advise Taxpayer of the timeframe and procedures of section 301.9100-3 of the Procedure and Administration Regulations (Proc. & Admin. Regs). Taxpayer subsequently submitted this ruling request seeking approval of the late election to treat the proceeds of the sale of the building as investment income.

Upon review of the amended return, an Internal Revenue Service Employee notified Accountant of the required procedures under § 301.9100-3, Proc. & Admin. Regs., and suggested Taxpayer submit a request for a private letter ruling pursuant to those procedures. Taxpayer then sought assistance from the Taxpayer Advocate Service (TAS). A TAS representative considered the matter and ultimately provided a similar suggestion, specifically to submit a private letter ruling request. Taxpayer thus submitted this request for a private letter ruling.

LAW

Section 163(d)(1) provides that in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year.

Section 163(d)(4)(B) of the Code provides that investment income means the sum of –

- (i) gross income from property held for investment (other than any gain taken into account under clause (ii)(I)),
- (ii) the excess (if any) of —
 - (I) the net gain attributable to the disposition of property held for investment, over

(II) the net capital gain determined solely by taking into account gains and losses from dispositions of property held for investment, plus

(III) so much of the net capital gain referred to in clause (ii) (II) (or, if lesser, the net gain referred to in clause (ii)(I)) as the taxpayer elects to take into account under this clause.

Section 1.163(d)-(1)(b) states that the election under § 163(d)(4)(B)(iii) must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized. The election is made on Form 4952 in accordance with the form and its instructions. The net capital gain taken into account as investment income under this election is not eligible to be taxed at capital gain rates. Section 1.163(d)-(1)(a).

Sections 301.9100-1 through 301.9100-3, Proc. & Admin. Regs., provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements for an automatic extension.

Section 301.9100-1(b) defines the term “regulatory election” as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad) under all subtitles of the Internal Revenue Code except subtitles E, G, H and I.

Section 301.9100-3 provides extensions of time to make a regulatory election for requests that do not meet the requirements of § 301.9100-2. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer —

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) competent to render advice on the regulatory election; or (ii) aware of all relevant facts.

When the taxpayer relied on a qualified tax professional for advice, the taxpayer must provide a detailed affidavit describing the engagement and responsibilities of the professional as well as the extent to which the taxpayer relied on the professional. Section 301.9100-3(e)(2). Further, the regulations require that the taxpayer submit a detailed affidavit from, as relevant here, the taxpayer's return preparer describing the engagement and responsibilities of the return preparer and advice that was provided to the taxpayer. Section 301.9100-3(e)(3). Taxpayer provided the required affidavits.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

CONCLUSION

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in the regulations under §1.163(d)-1(b). The Commissioner has discretion to grant a reasonable extension of time to make a regulatory election under all subtitles of the Code except subtitles E, G, H, and I, provided that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interests of the Government. In this instance, the information and representations made by the Taxpayer, Accountant, and Business Accountant establish the Taxpayer acted reasonably and in good faith. Additionally, granting an extension will not prejudice the interests of the government. Taxpayer has represented that granting relief would result in the same tax treatment as if the amended return had been filed timely. The taxable year in which the regulatory election should have been made is not closed by the period of assessment.

Taxpayer is granted an extension of time for making the election until 60 days following the date of this ruling. The election should be made by attaching Form 4952 and Schedule D, and by including a copy of this ruling letter with an amended return for Year.

This ruling is limited to providing an extension of time for making an election under § 163(d)(4)(B)(iii). It does not provide an opinion, express or implied, concerning the tax consequences of any aspect of the transaction or item discussed or referenced in this letter.

The ruling contained in this letter is based upon information and representations submitted and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Brinton T. Warren,
Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax & Accounting)